# COMMISSION ADVISORY NO. 90-01

## NEGOTIATION FOR PROSPECTIVE EMPLOYMENT

## I. INTRODUCTION

The purpose of this Advisory[(1)] is to explain how G.L. c. 268A applies when public employees are either contemplating or commencing negotiations for prospective employment. The conflict of interest law, G.L. c. 268A, attempts to insure that a public employee's loyalty to the public interest will not be clouded by potentially competing private loyalties. There is a substantial risk of conflicting loyalties whenever a public employee negotiates for prospective employment with a party with whom the employee has concurrent official dealings.[(2)]

## II. THE LAW

All public employees, whether state, county or municipal employees, are subject to similar restrictions under G.L. c. 268A. Section 6 prohibits a state employee from participating[(3)] officially in any particular matter[(4)] in which any person or organization with whom the employee is negotiating or has any arrangement concerning prospective employment has a financial interest. County and municipal employees are subject to parallel restrictions under §§13 and 19, respectively.

The conflict of interest law does not prohibit a public employee from seeking prospective full or part-time employment. The law does require, however, that certain abstention and/or disclosure requirements be observed before the employee participates officially in a matter affecting the financial interests of the person or organization with whom the employee is negotiating. State and county employees must abstain from participation in the matter and must also notify in writing both the State Ethics Commission and their appointing official of the nature and circumstances of the particular matter and make full disclosure of the financial interest affected.[(5)] Municipal employees may abstain from participation in the matter or, in order to participate, must make a disclosure to their appointing official. For the purposes of notification, the appointing official is the official with the statutory authority to make the appointment of an employee, and is not necessarily the employee's immediate supervisor.[(6)]

At this stage, the law shifts responsibility onto the employee's appointing official to determine how the public agency should handle the matter. The appointing official, following notification of the financial interest, can exercise one of three options. The official may either: (1) assign the matter to another employee; or (2) assume responsibility for the particular matter; or (3) grant written permission to the employee to participate. The written permission must include a determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of the services that the public expects from the employee. In the case of state and county employees, the appointing official must also file with the Ethics Commission a copy of the written permission granted under (3), above. Following receipt of the appointing official's permission and, for a state or county employee, after notifying the Ethics Commission, the employee may participate in the matter.[(7)]

The law establishes substantial consequences for an employee who violates G.L. c. 268A by participating in a matter without complying with the notification requirements and without receiving from his or her appointing official written permission to participate. Not only is the employee subject to civil and criminal penalties under G.L. c. 268A, §§6, 13, 19 and G.L. c. 268B, §4, but also any governmental action that was substantially influenced by the employee's participation may be rescinded. See G.L. c. 268A, §§9, 15 and 21. While the Commission is sensitive to the potential

difficulty state and county employees may experience in having to disclose to their current appointing official prospective employment negotiations with another person or organization, the disclosure requirements enacted by the Legislature protect the public interest from potentially competing personal loyalties.

**III. NEGOTIATING FOR PROSPECTIVE EMPLOYMENT**

The abstention and notification requirements of G.L. c. 268A, §§6, 13 and 19 accrue when an employee is negotiating for prospective employment with "any person or organization." The term "person" includes individuals, corporations, societies, associations, and partnerships. The term "organization" includes corporations, business trusts, estates, partnerships, associations, two or more persons having a joint or common interest, and any other legal or commercial entity, as well as federal, state or local governmental agencies and subdivisions. For example, the IRS, the federal EPA, and the United States Department of Justice would each be considered an organization within the meaning of §6.[(8)] Although the term "negotiating for prospective employment" is not defined in G.L. c. 268A, the Commission and courts have given a common sense meaning to negotiating.[(9)]

The key operating principle is mutuality of interest. Where a public employee and a person or organization have scheduled a meeting to discuss the availability of a position and the employee's qualifications for that position, the employee will be regarded as negotiating for prospective employment with that person or organization. See EC-COI-82-8 (where an employee affirmatively responds to an inquiry from a prospective employer and meets with the employer, the employee is negotiating for future employment[(10)]

For the purposes of G.L. c. 268A, §§6, 13 and 19, prospective employment negotiations are synonymous with discussions and are not limited to the final meetings during which the parties review salary and other terms of employment. See In re Esposito 1991 SEC 529. Nor does negotiation require a face to face meeting. See In re Hatch, 1986 SEC 260 (a state employee violates §6 by officially participating in a contract with a company with whom she is concurrently discussing prospective employment by telephone).

Not all employment interest inquiries, however, rise to the level of negotiations for G.L. c. 268A purposes. For example, an employee who submits an application in response to an advertisement will not be considered to be negotiating with that employer until the prospective employer arranges for an interview with the employee. An employee who submits an application in response to an advertisement that does not identify the prospective employer will not be considered to be negotiating with that employer until the prospective employer identifies itself and arranges for an interview with the employee. Similarly, meetings with professional or social acquaintances (commonly referred to as networking) to discuss general opportunities in a professional field will not ordinarily be treated as negotiations.[(11)] Where there is a mutuality of interest between a public employee and a prospective employer for a particular position, the employee's loyalty may become divided between the public interest and personal interest when dealing with matters affecting the prospective employer's financial interests. In such situations, the employee must abstain from participating in these matters unless and until the employee receives from his or her appointing official written permission to participate.

**IV. OUTCOME OF NEGOTIATIONS**

If the negotiations lead to an offer of full or part-time employment that the public employee accepts, the employee has an arrangement for future employment. The employee must, therefore, continue to abstain from official participation in any matter affecting the financial interests of a person or organization with whom the employee has an arrangement for future employment. The employee must also continue to observe the abstention and disclosure requirements of G.L. c. 268A, §§6, 13 and 19 discussed previously, unless and until the employee receives written permission to participate. See In re Hatch, 1986 SEC 260 (state employee violates §6 by participating in contract involving company for whom she had accepted a job offer).

If, by objective standards, the negotiations have been terminated through the action of either the public employee or the prospective employer, the employee will no longer be considered to be negotiating for prospective employment with that employer. The employee should apprise his or her appointing official of the termination of negotiations to enable the appointing official to determine whether and when the employee may be assigned prospectively to handle

matters involving the employer.

**V. ADDITIONAL SAFEGUARDS**

A. Under G.L. c. 268A, §23(b)(3), a public employee may not act in a manner which would cause a reasonable person to conclude that any person can improperly enjoy the employee's favor in the performance of official duties, or that the employee is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. This appearance of conflict may be dispelled if the employee discloses the relevant facts to his or her appointing official.

An appearance of a conflict of interest arises in at least two distinct circumstances. First, when a public employee contacts someone or some entity regarding future employment, an appearance of a conflict of interest arises if the public employee is engaged in a particular matter for the government and knows that the person or organization he or she has contacted for possible future employment is either a party to, or otherwise has an active interest in, that matter. The appearance of a conflict arises regardless of whether the organization has a direct or foreseeable financial interest in the matter, or whether negotiations for prospective employment have actually begun. EC-COI-92-3. Rather, while having responsibility for a governmental matter in which the person or organization is interested, it is the act of contacting the interested person or organization for possible future employment that triggers the disclosure requirements under §23.

The Commission has found that an appearance of a conflict arises under these circumstances because "it may appear that [public employees] would somehow act in a manner designed to place [their] own interests ahead of the [government's interest]." EC-COI-92-3.

For example, a state employee is involved with litigation for the Commonwealth. A federal governmental agency is also a party to the action (but not necessarily an adverse one). An appearance of a conflict of interest would arise if the state employee were to contact the federal agency for a job, while the litigation is pending, because it might be perceived that she will try to curry favor with the agency by agreeing to their litigation strategies and proposals, without concern for the effects on the Commonwealth's legal position.[(12)]

Second, an appearance of a conflict of interest arises whenever a state employee has terminated negotiations with a person or organization but continues to exercise official responsibility over that person or organization. The law does not prescribe any particular "cooling off period" prior to an employee resuming participation in matters affecting a prospective employer with whom the employee has terminated negotiations.[(13)] Following confirmation of the termination of negotiations, the employee's appointing official is presumably in a position to evaluate the needs of the particular governmental agency, as well as the perception that a premature assignment might create. This determination rests within the sound discretion of the appointing official.

B. A disclosure under §23(b)(3) may also be appropriate when a public employee is about to participate in, but has not previously been assigned, matters involving a prospective employer with whom he or she has recently terminated negotiations. For example, if negotiations have terminated the day before an employee is newly assigned a matter involving the same prospective employer, the employee should disclose to his or her appointing official the fact that negotiations have recently terminated with that employer. Alternatively, the employee may abstain entirely from participation in the matter, thereby avoiding any actual or apparent bias as well as the requirements of a disclosure. The public employee should contact the Commission for further advice about this type of disclosure.

C. Under G.L. c. 268A, §23(b)(2), a public employee may not use his or her official position to secure an unwarranted privilege of substantial value for the employee or others. To comply with §23(b)(2), a public employee must avoid using his or her position to exploit the vulnerability of persons or organizations that are dependent on the public employee's official actions. A public employee must, therefore, exercise caution in these situations and are urged to seek more specific guidance from the Commission before pursuing prospective employment with persons or organizations with matters pending within the official responsibility[(14)] of the employee.

D. Under G.L. c. 268A, §23(c), a public employee may not disclose to individuals or organizations any confidential

information the employee has acquired in the course of his or her official duties, nor use such information to further the employee's personal interest. A public employee must observe this restriction in particular when negotiating for prospective employment. The disclosure of confidential information may not be used to advance the interests of the public employee at the expense of the public interest.

**VI. CONCLUSION**

The conflict of interest law attempts to balance a public employee's right to seek future employment with the public interest in assuring that an employee will make decisions in the public interest, rather than with an eye towards prospective employment. Where there is mutuality of interest between an employee and prospective employer, the law requires that a different agency employee participate in matters affecting the prospective employer, unless the disclosure and permission requirements of §§6, 13 and 19 have been observed. By observing the additional safeguards of §23, a public employee will avoid any actual or apparent risk that the employee's official conduct has been affected by private employment arrangements or negotiations.

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**FOOTNOTES**

1. The Commission issues Advisories periodically to interpret various provision of the conflict of interest law. Advisories respond to issues that may arise in the context of a particular advisory opinion or enforcement action but which have the potential for broad application. It is important to keep in mind that this advisory is general in nature and is not an exhaustive review of the conflict law. For specific questions, public officials and employees should contact their agency counsel or the Legal Division of the State Ethics Commission at (617) 371-9500. Copies of all Advisories are available from the Commission office or online at www.mass.gov/ethics.

2. The relevant language in G.L. c. 268A also appears in the statute's federal counterpart, 18 USC 208. Both laws were derived from the comprehensive 1960 report of the Association of the Bar of the City of New York. See §3(b)(4) of the Bar Association's proposed statute. Special Committee on the Federal Conflict of Interest laws of the Association of the Bar of the City of New York, Conflict of Interest and Public Service 280 (1960). That report concluded: The risk is not bribery through the device of job offers; the risk is that of sapping governmental policy, especially regulatory policy, through the nagging and persistent conflicting interests of the government official who has his eye cocked toward subsequent private employment. To turn the matter around, the greatest public risks arising from post-employment conduct may well occur during the period of government employment ... Id. at 234.

3. "Participate," is defined in G.L. c. 268A, §1(j) as participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

4. "Particular matter," is defined in G.L. c. 268A, §1(k) as any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

5. Note that there are additional, and more stringent, disclosure requirements which may arise under §23(b)(3) in certain circumstances. These requirements are described below in Section V, Additional Safeguards.

6. Any employee who is uncertain as to the identity of the employee's appointing official for G.L. c. 268A purposes may seek advice from the Commission on this point. See EC-COI-87-41.

7. Elected state, county or municipal employees do not have an appointing official who can grant permission to participate in matters affecting the financial interests of persons or organizations with which the elected official is

negotiating for prospective employment. Thus, elected officials may not participate in such matters.

8. The federal government is not considered a single organization for §6 purposes. Rather, each separate federal agency is considered an "organization." EC-COI-92-3.

9. In United States v. Conlon, 628 F.2d 150 (2nd Cir. 1980), cert. den. 454 U.S. 1149 (1982), the Court of Appeals concluded that the word negotiating was to be given a broad reading, rather than the narrow reading accorded by the district court. The Court's conclusion was based on its reading of the legislative history of 18 U.S.C. 208, which was intended to strengthen and expand existing prescriptions on official participation. General Laws c. 268A was derived from the same history. See Final Report, Special Commission on Code of Ethics, 1962 House Doc. No. 3650, p.8.

10. See also Perkins, The New Federal Conflict of Interest Law, 76 Harvard Law Rev. 1113, 1133 (1963)("The lure of a lucrative job following government employment is often great, and it is essential that a quarantine on official dealings with prospective employers be established as soon as future employment becomes a matter of discussion or understanding.")

11. See also Section V, Additional Safeguards below.

12. Thus, a disclosure to the state employee's appointing authority under §23 may be required far earlier than might otherwise be necessary under §6. As described above, §6 requires a public disclosure only when a state employee who is required to participate in a particular matter has begun negotiations for prospective employment with a person or organization with a direct or foreseeable financial interest in that matter. The §23 disclosure, unlike the §6 disclosure, does not require any action on the part of the employee's appointing authority, however. Nor does it require a filing with the Commission.

13. It has been suggested that once negotiations have broken off, an employee would be well advised to steer a wide berth around participation. Buss, The Massachusetts Conflict of Interest Law: An Analysis, 45 B.U. Law Rev. 299, 359 n. 324. Buss also indicates that the standards of conduct now contained in §23 have a useful and appropriate role to play in these circumstances.

14. "Official responsibility," is defined in G.L. c. 268A, §1(i) as the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.

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